

Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

APEXART CURATORIAL PROGRAM,
INC.,

Plaintiff,

v.

BAYSIDE ROLLERS LLC, ABIGAIL
CARSWELL, BAYSIDE HOSPITALITY
LLC, a Washington Limited Liability
Company, and AMERICAN URBAN
ART AND GRAFFITI CONSERVATION
PROJECT, a Washington Non-Profit
Corporation,

Defendants.

CASE NO.
2:22-cv-01807-TSZ

**DECLARATION OF JOHN
CARSWELL IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT &
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

I, JOHN CARSWELL, declare under the penalty of perjury of the laws of the State of
Washington and the United States of America that the following is true and correct:

DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT &
OPPOSITION TO PLAINTIFF'S MOTION-Page 1

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- 1 1. I am above the age of eighteen and am otherwise competent to testify to the
2 matters herein. I make this declaration based on my personal knowledge and
3 experience.
- 4 2. I have spent the last 30 years in commercial construction, have now stopped that
5 life, and am putting all my energy (and money) and planning into my vision at
6 1611 Everett Ave, Washington. Below is the building purchased to create the
7 APEX Art and Culture Center.
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- 18 3. The building has a long history in the City of Everett and was built in 1921 as
19 the former community center by the local Knights of Columbus, before
20 becoming a Masonic temple for most of the 20th century, but it has sat largely
21 vacant for the past 15 years or so. We have had to do a lot of work to the
22 building, but keeping it true to its historical feel of 1920s opulence, to make it
23 into a vibrant entertainment and gathering center again for the community,
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25 DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
26 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT &
27 OPPOSITION TO PLAINTIFF'S MOTION-Page 2

OJALA LAW

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1 contrasting and mixing the historic opulence, with the more recent street art and
2 culture. The building has several halls and a theater which we are preserving and
3 using.

4 4. I formed Bayside Rollers LLC to purchase remodel and own 1611 Everett Ave
5 Property, where the APEX Art and Culture Center is now located. While
6 Bayside Rollers LLC closed on the purchase of 1611 Everett Ave Property on
7 August 8, 2022, it entered into the purchase and sale agreement on or about
8 April 1, 2022.

9 5. I am a 50% partner in ownership of Bayside Rollers LLC, and own 100% of
10 Bayside Hospitality LLC.

11 6. Bayside Hospitality LLC is now a tenant that owns and runs the restaurant and
12 entertainment events at the building (concerts, organized fights, etc.).

13 7. I also founded and set up the American Urban Art and Graffiti Conservation
14 Project (“AMGRAF”) nonprofit, and other people are involved in running and
15 continuing the museum, plans to formally organize starting in 2021, and finally
16 filing the non-profit articles and bylaws on or about 6/1/2022. The Articles of
17 Incorporation of AMGRAF provide: “The purpose and mission of the American
18 Urban Art and Graffiti Conservation Project is to preserve the only art form that
19 originated in America’s inner cities as a voice for those who felt invisible, and to
20 chronicle the rise of this artform into mainstream acceptance.”
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25 DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
26 DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT &
27 OPPOSITION TO PLAINTIFF’S MOTION-Page 3

OJALA LAW

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- 1 8. AMGRAF is also a tenant that will display my personal Dogtown Collection of
2 Aerosol Paint Expressionism (“APEX”) art to the public and to help promote the
3 good and human aspects of the subculture, and fight against or help reduce the
4 bad gang violence aspects of the subculture.
5
6 9. Graffiti Art or APEX type art is the only American art form originating,
7 historically, from America.¹
8
9 10. About twenty-years ago, my family and I started using our own acronym APEX
10 to refer to Aerosol Paint Expressionism. We began using this term because it
11 included more than just urban graffiti street art, but all types of art made with
12 aerosol paint.² This term began to be widely used among our own subculture of
13 street art. A picture is worth a thousand words. Below are several of examples of
14 what we consider to be this type of art and are from our collection, all composed
15 with aerosol paint cans.
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22 ¹ ArteFuse, *Should Graffiti be Considered Art?* <https://artefuse.com/2022/04/15/should-graffiti-be-considered-art/> (April 15, 2022).

23 ² We have since applied for a trademark to Aerosol Paint Expressionism under USPTO
24 Application 97546227 on 08/12/2022.

25 DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
26 DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT &
27 OPPOSITION TO PLAINTIFF’S MOTION-Page 4

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11. In around 2012, my family and I began using the name “Dogtown Collection” to refer to our collection of Aerosol Paint Expressionism art, which has thousands of pieces and is the largest collection in the world, as far as I am aware. The collection is exclusively the APEX genre of art.

DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT &
OPPOSITION TO PLAINTIFF’S MOTION-Page 5

OJALA LAW

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12. From our website <https://www.apexeverett.com/about-apex> we describe our building venue:

“Where History Meets Urban Creativity

At APEX Art & Culture Center, we celebrate the vibrant fusion of history, art, and entertainment, right in the heart of Everett, Washington. Nestled within the walls of a meticulously restored historic building, we invite you to embark on an extraordinary journey that will awaken your senses and ignite your passion for art and culture.

Discover the awe-inspiring gem of our establishment—the renowned DogTown Collection. Prepare to be captivated by the world's largest assemblage of graffiti and urban art, a true testament to the power of creativity and self-expression. Immerse yourself in the dynamic narratives woven through colorful murals and thought-provoking urban art, telling stories of urban life, resilience, and cultural diversity.

But our offerings don't stop there. APEX Art & Culture Center is a multifaceted destination where culinary delights, refined spirits, and soul-stirring music converge. Indulge your palate at 16Eleven, an upscale dining spot that tantalizes taste buds with the finest cuts of meat, expertly prepared and paired with exquisite flavors. Immerse yourself in a world of culinary artistry, where every bite is a masterpiece.

Unwind and socialize at El Sid Cocktail Lounge, an upscale bar where craft cocktails flow as smoothly as the conversations. Let our mixologists craft liquid poetry for you, elevating your evening with handcrafted libations that evoke sophistication and style.

And there's more to explore. Welcome to Kings Hall, the crown jewel of Everett's music scene. Experience live performances by world-class artists, immerse yourself in the rhythm of the city, and let the music transport you to a realm where joy and euphoria reign supreme. Kings Hall is your passport to unforgettable nights of melodic bliss and unparalleled entertainment.

APEX Art & Culture Center invites both residents and visitors of Snohomish County to partake in our exhilarating offerings. Whether you're an art enthusiast seeking inspiration, a connoisseur of fine dining, or a music lover in search of the perfect melody, our diverse range of experiences will leave you spellbound.

Come, be a part of our story. Let the echoes of the past merge seamlessly with the vibrancy of the present, as we redefine the boundaries of art and culture in Everett. APEX Art & Culture Center: Unleashing the soul of creativity, where history meets urban magic.”

DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT &
OPPOSITION TO PLAINTIFF'S MOTION-Page 6

OJALA LAW

INC PS

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1 13. The above statement also captures our intent and goals for expansion. For
2 example, the El Sid Cocktail lounge is still in the works. Also, there are plans to
3 have the Rosella Gallery in Snohomish Washington potentially move into the
4 building as the retail arm affiliated with AMGRAF to sell prints and other items
5 displaying pieces from the Dogtown Collection (only aerosol paint art).
6

7 14. Inside of APEX Art and Culture Center, the museum is set to open more
8 generally (currently by appointment) later this year, and it only showcases
9 APEX type art, and specifically on loan from my Dogtown Collection. In other
10 words, in order to be displayed in the museum the art must be created with only
11 aerosol paint.
12

13 15. I was first intrigued by graffiti growing up in Southern California in the 1980s
14 while in junior high school. Many of my friends and their Mexican-American
15 “Chicano”³ families had older siblings that participated in street graffiti, even as
16 juvenile delinquents or gang members.

17 16. I started out only collecting APEX type art from street artists I personally liked.
18
19
20

21 ³ “Chicano” is what my family-oriented friends and their extended families called
22 themselves, very proud of their Mexican-American heritage. My friends older brothers and
23 cousins were respectful of their mothers, nice, and played with us kids, but I knew there
24 was also another side to them, some had been incarcerated for street violence, and had
other interests, like painting on the backs of freeway walls – beautiful, colorful, wildstyle,
or old English Script.

17. However, for about 20 years I watched as this art was rapidly disappearing through the whitewashing of the “canvas” that was so often on someone else’s property (on purpose). So, later in my collecting of the art, my family and I began to track down these street artists and ask them to create art for our collection on actual canvas, spending late nights and potentially dangerous walks meeting them. I have had the opportunity of working with many street artists and creators of willing to do this- aerosol paint expressionism. We understood that without preservation of many varieties of these art pieces, a uniquely American art form, could and will be otherwise forever forgotten or not seen. As the number of pieces grew, I began calling my collection the “Dogtown Collection.”

18. Additionally, many of the creators in this art form have received no formal training. They also grow up in rough and violent street gang environments, and as a result are at risk of dying at young ages. The strong contrast in quality of life for these artists compared to other types of artists contributes heavily to the high rate of disappearance of graffiti street art, and unique styles of each artist.

19. I want to educate my community, and anyone specifically interested in this uniquely American art form on the importance preserving it. Moreover, AMGRAF has also partnered with organizations involved in helping those in street gangs and other subcultures of street life such as Hope for Homies which was present at the AMGRAF Preserve the Kulture event.

DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT &
OPPOSITION TO PLAINTIFF’S MOTION-Page 8

OJALA LAW
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1 20. AMGRAF is as much of an outreach and youth at risk program as it is an art
2 museum. It is affiliated with bringing together the artists to work together and
3 see each other as human and artists, not deadly gang rivals.

4 21. The AMGRAF museum only features portions of the Dogtown Collection,
5 which consist exclusively of aerosol paint expressionism, including the works of
6 inner-city artists and gang affiliated youth.
7

8 22. The APEX Art and Culture Center is also well suited for entertainment events,
9 including a theater and several halls in the building. In Fall of 2022, a
10 kickboxing show was the first ever event held at the APEX Art and Culture
11 Center. **Exhibit 300** a true and accurate copy of the social media post APEX Art
12 and Culture Center made to advertise this event.
13

14 23. On February 19, 2023, the concert hall, Kings Hall, located within the Apex Art
15 and Culture Center had its grand opening with a concert by the musical group
16 Hell's Belles. **Exhibit 301** a true and accurate copy of the social media post
17 APEX Art and Culture Center made to advertise this event.
18

19 24. On August 12, 2023, the upscale steak restaurant 16Eleven opened (operated by
20 Bayside Hospitality LLC) also within the APEX Art and Culture Center, as well
21 as an event called Preserve the Kulture as somewhat soft grand opening of the
22 AMGRAF museum. Yet, the museum is still not open to the public (except by
23 appointment). **Exhibit 302** a true and accurate copy of the 16Eleven website.
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25 DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
26 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT &
27 OPPOSITION TO PLAINTIFF'S MOTION-Page 9

OJALA LAW
INC PS
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Exhibit 303 a true and correct copy of a social media post made by APEX Art and Culture Center to advertise the Preserve the Kulture Event.

25. 16Eleven is known by many of our customers/consumers who reviewed the restaurant to be a locally owned Everett, Washington restaurant. **Exhibit 307** a true and accurate copy of the reviews.

26. My aspiration is and was to create a space for people to enjoy the aesthetic and the space of a venue that displays aerosol paint art and educates on aerosol paint art rather than just referring to it as “graffiti” which has some negative connotations. Specifically, we have a venue to build-up the local community of Everett, Washington and Snohomish County, and an interesting and intriguing place to gather and socialize. At its core, I also wanted to create something I and my peers are interested in and my target audience and customer is basically someone like myself.

27. The usage of APEX Art and Culture is vital to my venue because it serves as a sort of signal for the subculture of street artists that my venue will be a place that educates and displays their art to the public. We are not using it as the dictionary defined word of Apex meaning “superior” or a “point.”

28. I had not even heard of “apexart” until I received the letter from Duane Morris on June 8, 2023. I was somewhat surprised that someone would try to trademark something like “apexart.” The letter made me think, however, that there may be people out there wanting to misuse a name, and so my wife and I felt it would be

DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT &
OPPOSITION TO PLAINTIFF’S MOTION-Page 10

OJALA LAW

INC PS

PO BOX 211

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1 good to “trademark” our different marks given that we were starting to realize
 2 our vision – given the litigious nature of some people, and the unscrupulous
 3 nature of others. However, outside of that letter from Duane Morris and this
 4 lawsuit, I have not run across “apexart” or Plaintiff, or been made independently
 5 aware of them, even though I am active in the graffiti/urban street art/APEX art
 6 culture.
 7

8 29. While APEX means something specifically to me, I tried to look at Duane
 9 Morris letter objectively as well. Standing back, I still thought it was pretty
 10 obvious that my use of APEX Art and Culture Center is not confusing at all to a
 11 normal reasonable *human* person to their “apexart” mark. For example, their
 12 “apexart” is not a word, it is two words smashed together as one made up word
 13 on purpose to create something unique, new and different, rather than merely
 14 “apex” and “art” together. In a way, their “apexart” is more like a logo, not even
 15 a slogan. On the other hand, our use of APEX Art and Culture Center was to
 16 refer to the venue and building that housed the museum, the stage / concert
 17 venue, and the high end steak house, all juxtaposing 1920s opulence with raw
 18 street art and culture of our modern time.
 19

20 30. Adding to this, I felt even taking the names for what they are, our area in the
 21 market place, our purposes, and our goals seem so different in scope and
 22 geography that I felt and do believe, objectively, it is virtually impossible for
 23 someone to actually confuse our venue or organizations with Apex Art
 24

25 DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
 26 DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT &
 27 OPPOSITION TO PLAINTIFF’S MOTION-Page 11

OJALA LAW

INC PS

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1 Curatorial Program and specifically their “apexart” mark such that they would
2 divert funds from Plaintiff to Defendants, or from Defendants to Plaintiff for that
3 matter, or even confuse the two.

4 31. As a matter of fact, I have not been made aware of any actually confused
5 consumers confused between APEX Art and Culture Center and “apexart” or
6 Apex Art Curatorial Program.

7 32. From what I can tell online and from their letter to me, Apexart does not
8 participate in any of the types of programs or services Bayside Rollers LLC,
9 Bayside Hospitality LLC, AMGRAF, or myself or Abigail Carswell, according
10 to their website or mission statement. This also precludes any possibility of
11 confusion or diversion of funds from them to any of the Defendants, which is the
12 linchpin and mainstay criteria of trademark infringement.

13 33. I also did my own personal research on trademark infringement and brought the
14 letter to some attorneys I was acquainted with for a brief review. My ultimate
15 conclusion based on research and legal advice was that the letter sent by Duane
16 Morris was without merit.

17 34. Shortly after I received the letter from Duane Morris I had our mark registered
18 by my wife Abigail Carswell because I realized based on this letter that there are
19 many litigious people in the trademark field, and I wanted to preserve my mark.

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25 DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
26 DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT &
27 OPPOSITION TO PLAINTIFF’S MOTION-Page 12

OJALA LAW
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1 Abigail did her best to register it on her own without any professional help to
2 speak of.

3 35. Because Abigail Carswell and I are not experts on trademark registration with
4 the USPTO, our trademark application has been delayed seeking more
5 information about the scope of our services, and our application was not precise
6 in specifying the areas in which we offer services. The application itself was also
7 filed when our non-profit event venue was still being created and we had a
8 thousand other things going on with the project.

9
10 36. On March 29, 2023, the USPTO issued a nonfinal decision that more
11 information was needed on the admittedly sparse application for registration
12 filled out by Abigail Carswell, again when the APEX Art and Culture Center
13 was barely beginning. The USPTO provided suggestions of how we could better
14 define the services offered by the mark, to lawfully distinguish it from
15 potentially similar marks. One suggestion was to define the field of art in which
16 we offered services and to provide a website for the areas in which we planned
17 to offer services.
18

19 37. Accordingly, the following is an accurate depiction of our mark located on the
20 website, social media, and marketing materials for APEX Art and Culture
21 Center:
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25 DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
26 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT &
27 OPPOSITION TO PLAINTIFF'S MOTION-Page 13

OJALA LAW
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38. We also sought professional help. Currently, we have a new trademark application under serial No. 98143306 which is being handled by our intellectual property attorney Kyle Straughan of Karr Tuttle Campbell, and is a much more precise and accurate depiction of both our mark and the areas in which we offer services. **Exhibit 304** a true and accurate copy of the new trademark application filed by our attorney to replace the other application that Abigail filed for us.

39. This application is much more precise as to the category of services, offered by the trademark and the application is currently pending review and approval by the USPTO. On October 11, 2023, the original trademark registration for the Carswells, Serial No. 97464041 was naturally abandoned.

40. I have not, and I have absolutely no desire to profit off the Plaintiff's potential "goodwill" associated with its trademark "apexart." I created my event venue from my and my family's own unique ideas and interests, and I hope for it to be a unique spot in Everett, Washington for the local people and pacific northwest

DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT &
OPPOSITION TO PLAINTIFF'S MOTION-Page 14

OJALA LAW

INC PS

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1 region to learn and enjoy the often misunderstood Aerosol Paint Art
2 Expressionism. My goal is to help transform a local area of Washington State,
3 not to become part of or compete with a New York museum scene across the
4 country from us.

5
6 41. So it is true that I told Duane Morris that I didn't pay an attorney to review their
7 letter. However, it is also true that Plaintiff filed a lawsuit, knowing I would
8 have to pay an attorney. The Plaintiff is on its second law firm.

9
10 42. I have now expended a large amount of attorneys' fees to defend my creation
11 and vision of "APEX Art and Cultural Center." I have done this all while
12 starting this whole building project and launching the restaurant and event
13 venues. I literally have been working 15 hour+ days over the last year.

14
15 43. I do believe, or did believe that perhaps the Plaintiff just didn't have enough
16 information to know any better. I have encouraged the Plaintiff to come look at
17 my venue, when it asked for my deposition, so it could see and feel, as
18 reasonable humans, that my venue is not "trademark infringement" on "apexart"
19 in any sense.

20
21 44. Plaintiffs have apparently not felt it important enough to it to do so, and so sent
22 its lawyers to my building for my deposition alone.


23
24 45. Regrettably, I believe Plaintiffs filed this case with little research by the Plaintiff
25 beyond the bare bones "google alert" and pro se trademark application which it

26 DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
27 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT &
OPPOSITION TO PLAINTIFF'S MOTION-Page 15

OJALA LAW
INC PS
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1 was able to comment on. I feel this all has been appropriately handled through
2 the USPTO processes, and that this court action by Plaintiffs is premature and
3 unfounded.

4 DATED this 28 day of October, 2023.

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7 
8 JOHN CARSWELL

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25 DECLARATION OF JOHN CARSWELL IN SUPPORT OF THE
26 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT &
27 OPPOSITION TO PLAINTIFF'S MOTION-Page 16

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